

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

FILED

June 25, 2012

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In the Interest of: T.L.

No. 11-1697 (Wood County 09-JA-113)

MEMORANDUM DECISION

This appeal with accompanying appendix record, filed by counsel Ira Haught, arises from the Circuit Court of Wood County, wherein Petitioner Mother's post-termination visitation was terminated by order entered on December 8, 2011. The child's guardian ad litem, Robin Bonovitch, filed a response on behalf of the child in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney Lee Niezgod, also filed a response in support of the circuit court's order.

This Court has considered the parties' briefs and the appendix record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner Mother's parental rights were terminated in April of 2011. The circuit court granted her supervised post-termination visitation. In the fall of 2011, DHHR filed a motion to terminate this visitation and hearings were held on the matter in November of 2011. DHHR's motion was based on Petitioner Mother's failure to attend visits with her child for approximately one month, and after not having these visits, the child exhibited a significant decrease in the separation anxiety he experienced when he is away from his foster parents.¹ DHHR asserted in its motion that, for instance, the child was sleeping through the night instead of waking up looking for his foster parents. At the hearing, the circuit court heard testimony from the child's foster mother, S.S. On direct examination by DHHR, S.S. testified, in part, as follows:

State: And does [T.] ever ask for his biological mother? I'm not sure what he called her.

S.S.: No.

State: Would he recognize her if he saw her?

Petitioner: Your Honor, I'm going to object to that question. She can't testify as to the ability of the child to recognize the mother. She can testify as to what his reaction would be, but that's completely speculative.

¹ The child's foster parents have since become the child's adopted parents.

Court: Objection’s overruled. You may answer if you can.

...

S.S.: No, I don’t believe he does. We’ve had a couple of instances where we were within ten to fifteen feet of her, and there was no indication of recognition.

The circuit court also heard testimony from Petitioner Mother, the case manager who supervised some of the child’s visits, and an adoption specialist. In its December 8, 2011, order, the circuit court granted DHHR’s motion to terminate Petitioner Mother’s visitation to the subject child. It found that the child was removed from Petitioner Mother in 2009 when he was only two days old and placed with his foster parents where he continues to reside. The circuit court further found that the child’s aggressive behaviors minimized when visitation with Petitioner Mother was minimized and that a bond did not exist between mother and child. Petitioner Mother appeals this order terminating her post-termination visitation, arguing two assignments of error.

The Court has previously established the following standard of review:

“Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court’s account of the evidence is plausible in light of the record viewed in its entirety.” Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010).

On appeal, Petitioner Mother first argues that the circuit court erred when it allowed the child’s foster mother, S.S., to testify as to his ability to recognize Petitioner Mother. She argues that under Rule 602 of the West Virginia Rules of Evidence, “a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Here, Petitioner Mother argues that S.S. did not have personal knowledge of the child’s state of mind. Moreover, neither DHHR nor S.S. established the basis for her opinion or personal knowledge for her testimony. Because this testimony directly affected the circuit court’s decision as it related to whether a bond existed between Petitioner Mother and the child, Petitioner Mother was prejudiced by the circuit court’s decision to permit this testimony.

In response, the child's guardian ad litem and DHHR contend that the circuit court did not err in permitting this testimony. Both initially raise that the child here was not an available witness to testify on this matter because he was of a tender age. Both subsequently argue that S.S.'s testimony qualifies as a lay opinion and is admissible under West Virginia Rule of Evidence Rule 701. Here, S.S. had personal knowledge of the child's behaviors and reactions after fostering him from the time he was two days old. The guardian further argues that S.S. testified that she was with the child on the occasions when she observed that he appeared to lack recognition of Petitioner Mother. DHHR further argues that S.S.'s testimony was based on the child's behaviors, or lack of behaviors. Under Rule 602, S.S. properly testified because she had personal knowledge or perception of the facts from which her opinion derived. Moreover, DHHR argues that in the circuit court's opinion, it did not base its finding of the child's lack of bond with Petitioner Mother on S.S.'s testimony. Rather, it found that there was not a bond because the child has never lived with Petitioner Mother and at two years of age, has not developed the close emotional bond for which it takes several years. S.S.'s testimony did not appear to have affected the circuit court's decision with regard to the bonding issue and therefore, any error in this regard is harmless.

The Court finds no error in the circuit court's decision to allow S.S.'s testimony with regard to the child's ability to recognize Petitioner Mother. West Virginia Rules of Evidence Rule 701 directs that non-expert opinion testimony must be limited to opinions or inferences that are "(a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' [sic] testimony or the determination of a fact in issue." Rule of Evidence 602 directs that a witness may not testify to a matter unless there has been evidence to support the witness's personal knowledge of this matter. Here, a review of the appendix indicates that S.S. has been the child's foster mother since he was two days old and remained his foster mother throughout the case. S.S. was present with the child on occasions in which she could observe his reactions to seeing Petitioner Mother. Consequently, it was not improper for the circuit court to allow S.S. to testify about the child's recognition, or lack of recognition, of Petitioner Mother.

Petitioner Mother also argues on appeal that the circuit court erred when it terminated her continued association and post-termination visitation with the child. She argues that the evidence established that (1) a bond existed between Petitioner Mother and the child, (2) continued contact and visitation between Petitioner Mother and the child would not be detrimental to the child's well-being, and (3) continued visitation with Petitioner Mother was in the best interest of the child. She argues that "even where termination of parental rights is justified, a continued relationship between parent and child by means of post-termination visitation may be valuable to the child's emotional well-being." *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 260, 470 S.E.2d 205, 214 (1996) (citing Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 448, 460 S.E.2d 692, 694 (1995)). Here, first, Petitioner Mother argues that the case manager from Westbrook Health Services who supervised the visits between Petitioner Mother and the child testified that the child responded well and positively to Petitioner Mother, was upset when Petitioner Mother left the room, and referred to Petitioner Mother as "momma." She testified that she observed a bond between Petitioner Mother and the child and that visitation was beneficial to the child. Next, Petitioner Mother asserts that although the foster mother testified that the child's behavioral issues subsided after an extended break from contact with

Petitioner Mother, the foster mother also testified that the behavioral problems also occurred during periods of time well after contact with Petitioner Mother. The adoption specialist who testified did not recommend visitation but also had never observed the child with Petitioner Mother. Lastly, Petitioner Mother asserts that continued contact is in the child's best interest because there was no direct correlation between the child's behavioral problems and his contact with Petitioner Mother. Petitioner Mother argues that the case manager's testimony is the most relevant here because she directly observed contact between the child and Petitioner Mother. Petitioner Mother argues that accordingly, the circuit court erred in terminating Petitioner Mother's visitation with the subject child.

The guardian and DHHR respond, contending that the circuit court did not err in terminating Petitioner Mother's parental visitation to the child. Both argue as follows:

“When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between a parent and child and the child's wishes, if he or she is of appropriate maturity to make such a request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.’ Syllabus Point 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).” Syl. Pt. 8, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

Syl. Pt. 8, *In re: Charity H.*, 215 W.Va. 208, 599 S.E.2d 631 (2004). Further, post-termination visitation is a right that belongs to the child, not the parent. See *In re Billy Joe M.*, 206 W.Va. 1, 521 S.E.2d 173 (1999). The guardian and DHHR argue that the evidence does not show that there was a strong emotional bond between Petitioner Mother and the subject child. The only evidence Petitioner Mother presented in this regard was by the visitation supervisor's testimony. However, the visitation supervisor did not attend all visits and DHHR asserts that the visitation supervisor admitted that she did not have information about the child's behaviors after the visits. Moreover, the visitation supervisor who testified did not supervise visits for about one year when another agency supervised visits. None of these other visitation supervisors were called to testify. Testimony indicated that the child was having confusion and anxiety at the visits, and also at home, exhibited by his need to go into his foster parents' bed at night and place his hands through his foster mother's hair. DHHR further asserts that the child and Petitioner Mother have spent no time together outside of the supervised visitation room.

The Court finds that the circuit court did not abuse its discretion in terminating Petitioner Mother's visitation with the child. “[T]he welfare of the child is the polar star by which the discretion of the court will be guided.’ Syl. pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972).” Syl. Pt. 4, in part, *In re Samantha S.*, 222 W.Va. 517, 667 S.E.2d 573 (2008). Further, visitation should not “unreasonably interfere with [the child's] permanent placement.’ *State*

ex rel. Amy M., 196 W.Va. [251] at 260, 470 S.E.2d [205] at 214 [(1996)].” *In re Alyssa W.*, 217 W.Va. 707, 711, 619 S.E.2d 220, 224 (2005). A review of the appendix supports the circuit court’s findings of fact and conclusions of law. The child lived with his foster parents since he was two days old and continues to live with them now after they adopted him in December of 2011. Although the visitation supervisor testified that the visits were fine, no other evidence was presented to demonstrate a strong emotional bond between the child and Petitioner Mother. The Court finds no error in the circuit court’s decision to terminate Petitioner Mother’s post-termination visitation.

For the foregoing reasons, we find no error in the decision of the circuit court and the termination of parental visitation is hereby affirmed.

Affirmed.

ISSUED: June 25, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh